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IN THE

Supreme Court of the United States

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No. 1175

R. V. McGINNIS THEATRES & PAY T. V., INC.,
Petitioner,

versus

VIDEO INDEPENDENT THEATRES, INC., *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES, R. V. McGINNIS THEATRES & PAY T. V. INC., PETITIONER, PRAYS THAT A WRIT OF CERTIORARI ISSUE TO REVIEW FINAL JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT ENTERED IN THE ABOVE-ENTITLED CASE NOVEMBER 28, 1967.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE

TENTH CIRCUIT.

The petitioner, R. V. McGinnis Theatres & Pay T. V., Inc., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, affirming a judgment entered for the respondents by the District Court, entered after the District Court allowed motions of the respondents to dismiss the action.

OPINION BELOW

The opinion of the District Court is reported in 262 F. Supp. 607. It is also printed in Appendix B to this petition.

The opinion of the Court of Appeals is not yet reported. It is printed in Appendix A to this petition.

JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit was entered on November 28, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1). The jurisdiction of the District Court was based on the Clayton Act, Sections 4, 16, 38 Stat. 731, 737, 15 U.S.C. Section 15, 26.

QUESTIONS PRESENTED

1. Whether a Federal Court may nullify *Erie Railroad* v. *Tompkins* and subsequent decisions of this Court and adjudicate a corporation dead and without capacity to sue, when that corporation has been held to be alive and in good standing by duly authorized agencies of the State of its incorporation.

2. Whether a Federal Court may overrule a reasonable interpretation of a State statute by the duly authorized agencies of the State entrusted with the enforcement of that statute.

3. Whether the decisions of the courts below, if allowed to stand, will completely nullify decisions of this Court requiring a balancing of Federal and State interests by Federal Courts, when those interests conflict.

STATUTES INVOLVED

The State of Oklahoma statutes involved are 68 O. S. 1965 Supp., Sections 1212(a), 1212(c), 1212(f); and 18 O. S. 1961 Section 1.198a. They are printed in Appendix C to this petition.

STATEMENT OF THE CASE

The petitioner, R. V. McGinnis Theatres & Pay T. V., Inc., operated two first run motion picture theatres in Tulsa, Oklahoma, from 1958 through 1960. On August 7, 1964, petitioner filed this suit in the United States District Court for the Northern District of Oklahoma under Sections 4 and 16 of the Clayton Act, 15 U.S.C. Section 15, 26, alleging that the seven respondent motion picture distributors conspired with the five respondent motion picture exhibitors to drive the petitioner out of business in violation of Sections 1 and 2 of the Sherman Act, 15 U.S.C. Sections 1-2.* Since the determination of the courts below did not relate in any way to the merits of petitioner's claims of violations of the antitrust laws by the respondents, there would appear no reason to further discuss those claims.

The petitioner was incorporated in Oklahoma in 1958. This suit as commenced on August 7, 1964. The respondents attacked the capacity of petitioner to sue on the

*The respondents Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, United Artists Corporation, and Universal Film Exchanges, Inc. are all national distributors of motion picture films. The respondents Video Independent Theatres, Inc., Admiral Drive-In Theatre, Delman Theatre Corporation, Family Theatres, Inc., and Modern Theatres, Inc. are all exhibitors operating motion picture theatres in Tulsa.

ground that its charter had been revoked and cancelled on April 26, 1963. The record shows that petitioner's charter, however, was reinstated by Oklahoma on January 29, 1965 [R. 184-186], and that petitioner is a corporation existing and in good standing according to the Secretary of State of Oklahoma [R. 187]. The District Court held petitioner was dead and lacked the necessary capacity to sue and the Court of Appeals for the Tenth Circuit affirmed. Rule 17(b) of the Federal Rules of Civil Procedure provides that the capacity of a corporation to sue "shall be determined by the law under which it was organized".

There is little dispute between the parties as to the basic facts before this Court, and the bulk of the facts are set out in the Opinion of the District Court [Appendix B, *infra*, R. 196-205] For the convenience of the Court, petitioner has where possible referred to the Opinion of the District Court in setting out its statement of the facts, herein.

The Oklahoma Franchise Tax Law, now named the Oklahoma Franchise Code, requires corporations to pay annual Franchise Taxes. 68 O.S. 1961, Sec. 644.1, *et seq.*, 68 O.S. 1963 Supp. Sec. 12-1201, *et seq.*; 68 O.S. 1965 Supp. Sec. 1201, *et seq.* [R. 197]. Title 68 O.S. 1961 Sec. 644.13(1) provides in part that "If the report herein required and the tax levied is not filed and paid within the time provided under Paragraph 3, Section 9 . . . ." the Oklahoma Tax Commission ". . . . may enter an order directing the suspension of the charter or other instrument of organi-

zation, under which the corporation, association or organization may be organized, and the forfeiture of all corporate or other rights inuring thereunder." See Appendix C, *infra.* (In the 1963 Code, this provision was renumbered 68 O. S. 1963 Supp. Sec. 12-1212(a) and is now 68 O.S. 1965 Supp. Sec. 1212(a), but the text was not changed).

The petitioner failed to pay its franchise taxes as required by law, and the Oklahoma Tax Commission entered its Order on March 26, 1962, ordering and directing that petitioner's charter and its rights and privileges in the State of Oklahoma inuring to it under its charter ". . . . be, and the same are, hereby suspended". [R. 198, Appendix D. *infra*]. The Order further provided for the immediate transmission of petitioner's name to the Secretary of State. On the same day, March 26, 1962, petitioner was issued a "Notice of Suspension" by the Oklahoma Tax Commission [R. 199, Appendix E, *infra*].

On April 26, 1962, petitioner was issued a Notice of Suspension of its charter by the Secretary of State, stating as follows [R. 199-200]:

> "We have received notice from the Oklahoma Tax Commission of the suspension of your charter on March 26, 1962 for your failure to comply with the Oklahoma Franchise Tax Law. You are therefore notified that unless proof of reinstatement of your charter with the Oklahoma Tax Commission is received within one (1) year from the date of this notice, the Articles of Incorporation will be revoked and cancelled by this office."

Petitioner did not pay within the year and on March

26, 1963 the Secretary of State sent to it the following notice of revocation and concellation:

> "Pursuant to notice heretofore given under the provisions of Title 18, Section 1.198a, O.S. 1961, you are hereby notified that the Articles of Incorporation of the above corporation will be revoked and cancelled by the Secretary of State of Oklahoma 26th day of April, 1963 for failure to comply with the requirements of the Oklahoma Franchise Tax Law."

Petitioner corporation's charter life was 50 years from 1958 [R. 205]. On January 29, 1965, well within the charter life of petitioner, and after payment by petitioner of all fees and penalties due, the Oklahoma Tax Commission ordered that the "corporate rights" of petitioner be "reinstated", and that the "Order of the Oklahoma Tax Commission dated March 26, 1962, insofar as it related to petitioner corporation "be vacated, set aside and held for naught". It further ordered that a copy of "this order of the Tax Commission be forwarded to the Secretary of State *to be placed on record in said office* as required by law". (Emphasis supplied.) [R. 203]. The text of the Oklahoma Tax Commission's order is set out in Appendix F, *infra*.

The aforesaid Order of Reinstatement of the Oklahoma Tax Commission was in fact filed in the Secretary of State's office on February 3, 1965, as demonstrated by the certificate of the Secretary of State [R. 184-186, Appendix F, *infra*]. The certificate of good standing of petitioner corporation executed by the Secretary of State on July

19, 1966 (obtained by petitioner the day after a pre-trial hearing before the District Court on this matter) sets out that petitioner corporation "'*is* a corporation *duly organized and existing under and by virtue of the laws of the State of Oklahoma*", and "has paid the fees due this office *and is in good standing with the department, according to our records.*" (Emphasis supplied.) [R. 187, see Appendix G, *infra.*]

Various respondents filed motions to dismiss this action upon the alleged ground that petitioner ceased to exist and was legally dead under Oklahoma laws, and that petitioner therefore did not have the legal capacity to sue [R. 134]. The same question was raised by other respondents in their answers [R. 196]. On January 9, 1967 the District Court entered an Order allowing the motions of the various respondents [R. 209].

The Court of Appeals affirmed.

REASONS FOR GRANTING THE WRIT

1. It is important that the proper balance between Federal and State interests be maintained in the Federal system and that Federal Courts be prevented from substituting their judgment for that of duly authorized State agencies in matters particularly within the domain of the State. The courts below have created new law which is contrary to the principles of *Erie Railroad* v. *Tompkin*, 304 U. S. 64 (1938), and subsequent cases in this Court amplifying it, and correction of that error is necessary to preserve the proper balance between Federal and State

interests, and to prevent similar intrusions by Federal Courts in matters peculiarly within the interest of the sovereign state.

Pursuant to 68 O.S. 1961, Sec. 644.13(1), petitioner's charter was suspended and forfeited on April 26, 1962, for failure to pay the required Franchise Taxes. One year later on April 26, 1963, petitioner's charter was revoked and cancelled.

On January 29, 1965, well within the charter life of petitioner, and after payment by petitioner of all fees and penalties due, the Oklahoma Tax Commission ordered that the "corporate rights" of petitioner be "reinstated" and that the Order of Oklahoma Tax Commission dated March 26, 1962, insofar as it related to petitioner ". . . be vacated, set aside and held for naught . . . ." [R. 203]. It further ordered that a copy of "this order of the Tax Commission be forwarded to the Secretary of State *to be placed on record in said office* as required by law". (Emphasis supplied.) [R. 203]. According to the Records of the Secretary of State of the State of Oklahoma, the petitioner . . . . "is a corporation duly organized and existing under and by virtue of the laws of the State of Oklahoma". [R. 187]

The Courts below have ruled that petitioner corporation was dead and therefore has no capacity to sue, although petitioner corporation is held to be a corporation in good standing by the duly authorized agencies of the State of Oklahoma. The result is that petitioner is a corporation in good standing in the eyes of the State of Okla-

homa, but is a dead corporation in a Federal Court sitting in Oklahoma. This results in exactly the anomaly which decisions of this Court have cautioned Federal Courts to avoid. This Court should grant certiorari in the interest of preserving the proper balance between Federal and State interests and to prevent further similar unauthorized intrusions by the Federal Courts.

Thus, in *Byrd* v. *Blue Ridge Rural Electrical Cooperative, Inc.*, 356 U.S. 525 (1958), this Court upheld a Federal right to jury determination of factual issues, denied in analogous proceedings brought in the courts of the forum state, South Carolina, only after an exhaustive evaluation of the competing policies of State and local government which satisfied the majority of the Court that implementation of the Federal policy would work no substantial harm upon ". . . . an integral part of the special relationship created by the [State Workmen's Compensation] statute". [356 U. S. at 536] (Parenthetical matter inserted)

Similarly in *Hanna* v. *Plumer*, 380 U.S. 460 (1965), this Court carefully balanced Federal and State policy interests in competing rules for service of process, stating that such balancing of Federal and State policy interest is required, where such interests conflict [380 U.S. at 467].

In a separate concurring opinion, Justice Harlan pointed out [at p. 474]:

> ". . . . Erie recognized that there should not be two conflicting systems of law controlling the primary activity of citizens, for such alternative governing authority must necessarily give rise to a debilitating uncertainty in the planning of every day affairs . . . . Thus, in diversity cases, Erie commands that it be the State law governing primary private activity which prevails."

The courts below reached a contrary result. Petitioner is existing and in good standing in the eyes of the State of Oklahoma and dead and without capacity to sue according to a Federal Court sitting in Oklahoma. So how do officers and stockholders of petitioner govern their activities? As individuals to conform with the Federal Court or as a corporation to conform with the State of Oklahoma? Has not this ". . . alternate governing authority . . ." imposed by the courts below give rise to exactly ". . . the debilitating uncertainty in planning every day affairs . . ." warned against in Justice Harlan's concurring opinion in *Hanna* v. *Plumer*, above.

It is abundantly clear here that the procedure followed with regard to the reinstatement of appellant corporation was not an unique or unusual procedure followed for the benefit of this appellant, but was the normal procedure, authorized by 68 O. S. § 1212(f), which is uniformly followed by the Oklahoma State Tax Commission and the Secretary of State's office with regard to virtually hundreds of Oklahoma corporations which are reinstated by the Oklahoma Tax Commission long after the one-year period of suspension or forfeiture has elapsed. In fact the

appellant in its brief in the District Court, offered, if that Court considered it pertinent to "establish by appropriate deposition or affidavit the fact that this procedure of reinstatement employed with regard to this plaintiff, has been followed with regard to hundreds of other Oklahoma corporations by the Oklahoma Tax Commission and the Secretary of State." (R. 183)

And how are hundreds of other Oklahoma corporations, reinstated like petitioner more than one year after suspension and forfeiture, to govern this business activities? According to the courts below they are dead in the Federal Courts, even after reinstatement by the Oklahoma agencies.

In *Van Dusen* v. *Barrack*, 376 U. S. 612, in discussing Rule 17(a) of the Federal Rules, dealing with persons acting in a representative capacity, pointed out that the purpose of Rule 17 providing that capacity to sue shall be determined by the laws of the State "in which the District Court is held", is to work an accommodation of interests within the Federal system and to achieve a basic uniformity between State and Federal Courts. The District Court in the instant case achieved the diametrically opposite result. Purporting to determine the capacity of petitioner to sue in the Federal Court under Rule 17, the District Court held petitioner to be a dead corporation and without capacity to sue, although petitioner was existing and in good standing in the eyes of the State of Oklahoma.

This Court has pointed out that "State law is to be applied in the Federal as well as the State courts, and it is the duty of the former in every case to ascertain from *all available data* what the State law is and apply it rather than to prescribe a different rule . . . ." *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 211, at 236. (Emphasis supplied) It is now plain that "all the available data" includes decisions by State and administrative authorities which serve to interpret and apply State law. Such decisions are "effective and authoritative within the State" and "should be equally so in Federal Court". Rosenfield, *Administrative Determinations as State Law Under Erie* v. *Tompkins*, 24 N.Y.U. L.Q. 319, 335. (1949).

This was the holding in *Orme* v. *Lendahand Co.*, 128 F. 2d 756 (D.C. Cir., 1942). The opinion by Judge Rutledge dealt with the necessity to construe the Maryland Small Loan Act without the aid of a definitive state court decision. The Court first pointed out that the statute ". . . . interpreted literally and originally . . . ." would be highly persuasive in defendant's favor. However, in holding for plaintiff, the Court stated:

> "The matter has not been determined by the Maryland courts. In view of that fact, the *best evidence of the Maryland law is found in the long-settled and unvaried policy which has been followed by her officials charged with administration of the statute.* It would be a delicate thing for a foreign court to disregard or attempt to overturn such a practice . . ." 128 F. 2d at 757-58 (Emphasis supplied).

See also:

Driscoll, et al., v. *Edison Light & Power Co.*, 307 U.S. 104, at 114-15 (1939).

Even where Federal statutes are concerned, Federal Courts have hesitated to interpret those Federal statutes contrary to the interpretations made in the course of their official duties by Federal officials obliged to enforce them. Thus in *Udall* v. *Tallman*, 380 U.S. 1 (1965), this Court upheld the rejection of applications for petroleum leases of public lands handed down by the Secretary of the Interior on the basis of his interpretation of two orders governing his department, stating:

> "The Secretary's interpretation may not be the only one permitted by the language of the orders, but it is quite clearly a reasonable interpretation; courts must therefore respect it." 380 U.S. at page 4.
>
> "When faced with a problem of statutory construction, this Court shows great deference to the interpretation given the statute by the officers or agency charged wih its administration." 380 U.S. at page 16.

In *Whattoff* v. *United States*, 355 F. 2d 473 (8th Cir., 1966), the Eighth Circuit preserved an interpretation of a federal excise tax statute by an official responsible for its enforcement, stating:

> "The practical interpretation of a statute that had been acted upon by the officials charged with its administration should not be disturbed except for weighty reasons." (at page 478).

Accord: *Philadelphia Television Broadcasting Co.* v.

Federal Communications Commission, 359 F. 2d 282 (D.C. Cir., 1966).

Certainly the deference shown by the Federal Courts for the interpretation of Federal statutes by Federal administrative officers and agencies, where there is much less reason for the Federal Court to show restraint than with a State statute, affords additional authority for a showing of far greater respect by Federal Courts for the interpretation of State statutes by the state officials responsible for their enforcement.

In the instant case the question of the corporate status of petitioner was a matter in which the State of Oklahoma's interests were clearly predominant. The District Court could not properly substitute its judgment for that of the Oklahoma Tax Commission and Secretary of State, authorized agencies of the State of Oklahoma, since petitioner's corporate status was a matter peculiarly and exclusively within the dominion of the State of Oklahoma. Corporate status and the rights which attend it, proceed from the sovereign granting it.

> "(A) corporation can come to an end and its life extinguished only by the act or with the consent of the sovereign power by which it was established." 16 A Fletcher, *Cyclopedia Corporations*, Wolf Rev. 1962, p. 14.

In *Lillard* v. *Lonergan*, 72 F. 2d at 865 (10th Cir., 1934), cert. den., 293 U.S. 615 (1934), the Court stated:

> "A corporation can be dissolved and its affairs closed and its franchises seized or withdrawn only

by the sovereignty that created it, and in the way it provides." (at page 870)

The Supreme Court of Oklahoma, rejecting an effort to impose personal liability on a promissory note signed in behalf of a corporation, stated:

> "The reason generally given for this is that if rights and franchises have been usurped they are the rights and franchises of the sovereign and *he alone can interpose." Industrial Building and Loan Assn.* v. *Williams*, 131 Okl. 167, 268 Pac. 228, 231 (1928). (Emphasis supplied).

Here, the District Court took upon itself the power to extinguish the life of a corporation, by holding petitioner to be dissolved where the State of Oklahoma held petitioner to be in good standing. This constituted a usurping of power which rested solely and exclusively with the sovereign State of Oklahoma. Furthermore, the instant case is even stronger factually than a case where a Federal Court is asked to follow the interpretation of a State statute followed as a policy by authorized agencies. Here, the State of Oklahoma has already acted with regard to the corporation whose existence is being questioned before the Federal Court, and the agencies of the State of Oklahoma, who are duly authorized to enforce the statutes on the basis of which respondents questioned petitioner's status, have reinstated petitioner, and held petitioner to be a corporation existing and in good standing.

Pursuant to Rule 17 the District Court below was permitted to determine the capacity of petitioner to sue

in the Federal Court by that law under which petitioner was organized (i. e., the State of Oklahoma). However, having ascertained that petitioner had been reinstated and was in good standing since January, 1965, it is submitted that under the decisions set out *supra*, the District Court could not question the validity of the reinstatement and petitioner's good standing. The only question to the District Court was whether petitioner corporation, having been reinstated and in good standing since January, 1965, had the capacity to maintain the present suit. The answer to this question was categorically in the affirmative. Under the established authorities it would appear substantially undisputed that a valid reinstatement of petitioner in January, 1965, related back to the date of cancellation or revocation of petitioner's charter, and validated all corporate action taken in the interim including the institution of this suit in August, 1964. See: *Watts* v. *Liberty Royalties Co.*, 106 F. 2d 941 (10th Cir., 1939).

Accord, see also: *McClurg Co.* v. *Hill*, 96 Fed. 236 (5th Cir., 1938). *Held* v. *Crossthwaite*, 260 Fed. 613 (2nd Cir., 1919). *Joseph A. Holpach Co.* v. *United States*, 58 F. Supp. 560, Court of Claims (1945). *DeSilva Construction Corp.* v. *Herald*, 213 F. Supp. 184 (D.C.M.D. Fla.). *J. B. Wolfe, Inc.* v. *Salkind*, 70 A. 2d 72 M.J., 13 ALR. 2d 1214, 1949. *Cleveland* v. *Gore Bros.*, 58 P. 2d 931 Calif. (1936). *Hall* v. *Citizens National Trust & Savings Bank*, 128 P. 2d 545 Calif. (1942).

Apparently, the District Court below recognized the correctness of this proposition, stating:

> "If the plaintiff corporation was legally and validly reinstated, such reinstatement would relate back to the date of suspension and restore it to all its former powers, including the right to maintain this action." (Opinion, R. 204).

Diligent search has failed to find any case authorizing a Federal Court, as in the instant case, to rule a corporation dissolved and without capacity to sue, where the State of incorporation has held the corporation to be existing and in good standing. None of the cases cited by the courts below serve as any precedent for such an unwarranted interference by the Federal Court with the State's sovereignty over corporate existence.

Chicago Title & Trust Co. v. *Forty-one Thirty-six Wilcox Building Corporation,* 302 U.S. 120, relied upon by the Court of Appeals, is not relevant to the issue here, since the question before this Court in that case was whether a corporation admittedly ". . . dissolved, and put out of existence by the state which created it . . ." [at page 124] had under the laws of the state of its incorporation the right to continue in existence for litigation purposes. Therefore, the fact situation in that case would be similar to the fact situation which would have existed in the instant case if petitioner after revocation and cancellation in 1963 *had never been reinstated.* Then the Federal Court sitting in Oklahoma would look at the Oklahoma law and statutes to determine what the rights

were, if any, of a corporation which was revoked and cancelled to institute a suit. Similarly, in *United States* v. *Safeway Store, Inc.*, (10th Cir., 1944) 140 F. 2d 834, 836, relied upon by the Court of Appeals, the District Court considered the capacity of the corporation pursuant to the laws of the State of its incorporation, but it was undisputed that the corporation had been dissolved, and had not been reinstated. Neither case serves as any authority for a Federal Court to substitute its judgment as to petitioner's corporate status for that of petitioner's State of incorporation.

Nor do the other cases relied upon by the Court of Appeals have bearing on the issue before this Court. See: *Standard Surety & Casualty Co.* v. *State of Oklahoma* (10th Cir.), 145 F. 2d 605, 608; *Hampton* v. *Ewert*, (8th Cir., 1927) 22 F. 2d 81, 90, cert. denied 276 U.S. 623; *United States* v. *Finnell*, 185 U. S. 236, 244. None of these cases dealt with corporate status.

Standard Surety & Casualty Co. v. *State of Oklahoma, supra*, did not involve corporate status, nor, as in the instant case, direct action by a State agency resolving the specific matters before the Court, nor in fact had there been any showing at all of construction of the statute in issue by officers throughout the State charged with its administration. Both *Hampton* v. *Ewert, supra*, and *United States* v. *Finnell, supra*, dealt with the consideration to be given by a Federal Court to determinations of a Federal agency or department, and not to State agencies as in the instant case.

It can be seen from the above that the decisions of the courts below are contrary to *Erie Railroad* v. *Tompkins,* and subsequent decisions in the Erie line.

> "The logic of the ever lengthening train of cases since *Erie* v. *Tompkins* leads to the conclusion that appropriate state administrative determinations are among the data for ascertainment of state law and entitled to the same degree and extent of consideration in federal courts in this respect as are state judicial determinations."
>
> *Administrative Determinations as State Law Under Erie* v. *Tompkins,* Rosenfield, 24 N.Y.Y. L.Q. 319, 335 (1949).

Certainly the decision of the Tenth Circuit below also conflicts with the holding of the District Court of Columbia Circuit in *Orme* v. *Lendahand, supra.* In that case, after pointing out the patent non-conformity of the practice followed by State of Maryland officials with the letter of the statute involved, Judge Rutledge stated:

> "We do not feel at liberty to overthrow the practice and declare that the judgment of Maryland Administrative officials concerning what their law requires is wrong . . . If the Maryland officials have extended the practice too far in this minute respect, her courts should make the correction. Until they do others should give effect to the policy established by her administrative officials who supervise the operation of the statute."

2. A fair reading of the Oklahoma statutes involved supports the interpretation of those statutes adopted by the Oklahoma Tax Commission and Secretary of State in

reinstating petitioner and holding it to be in good standing.

The effect of the decision in the courts below is to allow a District Court to substitute its judgment with regard to the construction of State statutes for the construction adopted by State agencies duly authorized to enforce those statutes, even where the construction adopted by the State agencies represents a reasonable interpretation of the statutes. In the interests of preserving the proper balance between Federal and State interests, this Court should correct this error, and prevent similar intrusions by other Federal Courts in the future.

Clearly, the State of Oklahoma could enact statutes providing for revocation and cancellation of a corporation's charter, such as Sec. 1.198(a) for failure to pay franchise taxes. However, it could also provide by other statutes for reinstatement of the full corporate powers of such a corporation upon payment of past due franchise taxes and penalties. This is exactly what the State of Delaware had done in *Watts* v. *Liberty Royalties Co.*, 106 F. 2d 941 (10th Cir., 1939), and authorities cited therein.

This is plainly what the State of Oklahoma did in 68 Okla. Stat., Sec. 1212(f). Section 1212(f) specifically allows ". . . . after the issuance of such order of suspension and forfeiture . . ." for revival and reinstatement of the charter after ". . . . payment of accrued fees and penalties . . . prior to the expiration of the time provided in

such charter or other instrument of organization for the life of such corporation . . . ."

The suspension and forfeiture was in 1962. The revocation and cancellation of petitioner's charter was in 1963. Petitioner was originally incorporated in 1958 and its charter life was 50 years. Therefore, when petitioner was reinstated by the State of Oklahoma in January, 1965, it was after the suspension and forfeiture and within the charter life of the corporation in compliance with Section 1212(f).

In affirming the District Court, the Court of Appeals concluded that Section 1212(f) did not authorize reinstatement of petitioner corporation after revocation and cancellation of its charter, and therefore that petitioner did not have the legal capacity to sue. In reaching this result, the Court stated:

> ". . . . Section 1212(f) operates only after 'suspension and forfeiture'. Nothing therein authorizes revival or reinstatement after 'revocation and cancellation'. Here the taxes were not paid within the year and, in accordance with §1.198a the charter was revoked and cancelled by the Secretary of State.".

It is submitted that this interpretation of §1212(f) by the Court of Appeals strains the statute to arrive at a different result than the interpretation of the Oklahoma Tax Commission and Secretary of State. Certainly, §1212(f) can be reasonably interpreted to mean that the charter may be "revived and reinstated" *at any time* after "sus-

pension and forfeiture" so long as it is prior to the expiration of the charter life of the corporation. Certainly after "suspension and forfeiture" and "prior to the expiration of the time provided in such charter . . ." would appear to be the temporal boundaries within which the reinstatement and revival can take place. The reinstatement of petitioner in January, 1965 was after "suspension and forfeiture" and "prior to the expiration of the charter life" of petitioner. It thus complied with §1212(f). If the Legislature had intended to forbid reinstatement of a corporation's charter after "revocation and cancellation", it would have been a simple matter to include that language in §1212(f). It did not do this, and it is submitted that a fair reading of §1212(f) allows revival and reinstatement after the suspension and forfeiture and within the charter life of the corporation. Nor is there any conflict with Sec. 1.198a, which provides for the revocation and cancellation, because nothing in that statute forbids reinstatement or revival of the corporation after the specified revocation and cancellation provided for.

Not only does this interpretation appear reasonable on the face of the Sec. 1212(f), but it is also the construction placed upon it by the Oklahoma Tax Commission and Secretary of State. Furthermore, since the statutes involved are strictly revenue securing in purpose, this construction would accord with the legislative intent. Once the taxes have been paid there would be no reason to deny corporate existence to the corporation. This is evidenced by decisions in jurisdictions other than Oklahoma

which have held with substantial uniformity that such statutes are revenue statutes. See, for example, *Watts* v. *Liberty Royalties Co.*, 106 F. 2d 941 (10th Cir., 1939)*

3. The courts below were in error in allowing the dismissal of the distributor respondents on yet an additional ground.

The distributor respondents Paramount Film Distributing Corporation, Metro-Goldwyn-Mayer, Inc., Warner Bros. Pictures Distributing Corporation, Twentieth Century-Fox Film Corporation, Columbia Pictures Corporation, United Artists Corporation, and Universal Film Exchanges, Inc. each estopped to deny the existence of petitioner corporation in this action. Each of those distributor respondents, having licensed motion picture films for exhibition in petitioner's theatres during the period commencing with its incorporation in 1958 and ending with its reinstatement in 1965, are estopped to deny petitioner's incorporation. It is well settled law that a person or corporation who contracts or otherwise deals with a body of men as a corporation thereby admits that they are a corporation, and is estopped to deny their incorporation in an action against that individual or corporation based upon or arising out of such contract or course of dealing.

This is of course the law in Oklahoma also. See:

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*"It has generally been held that where charter laws provide for a cancellation and forfeiture of a corporate charter and corporate powers for failure to pay fees and also provide for a reinstatement of the powers of the corporation and the restoration of its charter upon the payment of its fees, the penalty provisions providing for forfeiture of its charter rights are largely for the purpose of collecting the charter fees and do not end the life of the corporation . . ." *Watts* v. *Liberty Royalties Co.*, 106 F. 2d 941 (10th Cir., 1939).

Methvin v. *American Savings & Loan Ass'n. of Anadarko, Oklahoma,* 194 Okla. 288, 151 P. 2d 370; *Industrial Building & Loan Ass'n* v. *Williams,* 131 Okla. 167, 268 P. 228; *Lynch* v. *Perryman,* 29 Okla. 615, 119 P. 229, Ann. Cas. 1913A 1065.

CONCLUSION

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,
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